

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBBIE D. HUBBARD

Claimant

VS.

EARTHGRAINS BAKING COMPANIES, INC.

Respondent

AND

**INDEMNITY INSURANCE COMPANY OF
NORTH AMERICA**

Insurance Carrier

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Docket No. 1,028,880

ORDER

Respondent appeals the October 12, 2009, Award of Administrative Law Judge Thomas Klein (ALJ). Claimant was awarded a 26 percent permanent partial functional disability to his right upper extremity at the level of the shoulder and a 16 percent permanent partial functional disability to the left arm for injuries suffered on April 3, 2006.

Claimant appeared by his attorney, Lawrence M. Gurney of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Douglas C. Hobbs of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ except as noted below. The parties stipulated to the Board that the temporary total disability compensation (TTD) and temporary partial disability compensation (TPD) amounts stipulated to at regular hearing are the correct numbers for the purpose of calculating this award. However, the TTD and TPD that were paid should be applied to the award for the left upper extremity rather than the award for the right shoulder which was the method utilized by the ALJ in the Award. The Board heard oral argument on January 13, 2010.

ISSUES

1. Did claimant suffer accidental injury to his right upper extremity which arose out of and in the course of his employment with respondent? Respondent does not

dispute that claimant suffered an accidental injury which arose out of and in the course of his employment to his left upper extremity. But respondent contends claimant's inconsistent injury history undercuts the credibility of his allegations.

2. Did claimant provide timely notice of the alleged accident or accidents to claimant's right upper extremity?
3. What is the nature and extent of claimant's injuries to his left and right upper extremities?

FINDINGS OF FACT

Claimant worked as an oven operator for respondent for approximately eight years. This job required that he move trays of product from racks to the ovens. This job was very fast and very repetitive. Claimant used his hands, arms and shoulders and was constantly grasping and gripping the trays. In early 2006, claimant began having hand and arm pain. The record conflicts as to whether claimant first experienced left upper extremity or right upper extremity pain. Claimant testified at different times to both. The first treatment was for left upper extremity complaints and was provided by Steven Hughes, D.O., and Benjamin R. Norman, M.D., of Via Christi Occupational & Environmental Medicine (Via Christi). The first examination was on April 6, 2006, at which time claimant was provided with a splint for his left hand and wrist, and pain medication and work restrictions also for the left hand. Claimant continued to be treated by Dr. Norman until April 26, 2006. At that time, claimant was referred for an orthopedic consultation. Also, at that visit, claimant, for the first time, described right hand pain which claimant stated had been present for one to two weeks.

Claimant was referred to board certified orthopedic hand specialist J. Mark Melhorn, M.D., for an evaluation on May 11, 2006. The initial diagnosis was one of "a painful left hand/wrist, tendonitis and mass, right, . . ." ¹ Claimant's left upper extremity pain extended into his elbow. Claimant was referred for nerve conduction tests for both the right and left upper extremities. Claimant was returned to work light duty with task rotation as a restriction.

Claimant testified that he underwent surgery to his left upper extremity on July 19, 2006, under the care of Dr. Melhorn. Claimant denied having surgery on the right upper extremity. However, the operative report, contained in Claimant's Exhibit 1 of the November 7, 2006, preliminary hearing transcript, describes a left carpal tunnel release; a left ulnar nerve elbow decompression; a right radial nerve elbow decompression; and a right lateral epicondylectomy, conjoined tendon release.

¹ P.H. Trans. (Nov. 7, 2006), Cl. Ex. 1.

It is noted that this claimant has only a 7th or 8th grade education with no GED. His powers of historical recall are suspect at best. However, in claimant's defense, the outpatient operative report of July 19, 2006, describes all procedures as being on the left side. The July 20, 2006, office note discusses a mass in the right hand palm area and early trigger finger in the right hand. The office notes from Dr. Melhorn thereafter concentrate primarily on the left upper extremity post surgery. There is mention of the right middle finger mass and Dupuytren's palm on the right. But, as claimant had been working light duty during this time, Dr. Melhorn questioned whether these conditions were related to claimant's job.

By the October 5, 2006, examination, claimant's left upper extremity was much improved. The task rotation restriction was considered very beneficial. As of the October 19, 2006, examination, claimant was reporting very little soreness in the left hand, with the overall appearance of the left upper extremity being good. Claimant had returned to his regular job, but task rotation continued as an option, although not a requirement. The October 23, 2006, report contained a 7.7 percent rating to claimant's left upper extremity at the level of the arm. This rating included impairment for pain and discomfort in the arm and loss of strength in the hand and arm. The final diagnosis included left carpal tunnel syndrome; left ulnar nerve and lateral epicondylitis; and left radial nerve in the elbow. The October 23, 2006, report contained no mention of the right upper extremity. Claimant returned to his regular job of oven operator.

At some point, although this record conflicts as to exactly when, claimant began having problems with his right upper extremity from the hand to the shoulder. He was referred by the ALJ to board certified orthopedic surgeon Pat D. Do, M.D., for an evaluation on February 9, 2007. EMG/NCT studies indicated possible nerve entrapment in the right elbow and right carpal tunnel syndrome. Claimant was treated conservatively, referred for physical therapy and returned to work on light duty. Claimant did not improve, and on May 21, 2007, Dr. Do performed an ulnar nerve transposition, carpal tunnel syndrome release and palmar mass excision, all on the right upper extremity. Claimant was then returned to work on May 23, 2007, but was restricted to left upper extremity work only.

At some point, in either June or July 2007, claimant's right shoulder was struck by a large bread rack. This incident was reported to Jerry Allen, respondent's production manager. Mr. Allen acknowledges that he was told about the accident to claimant's shoulder, but he is not sure as to the exact date. Mr. Allen does remember that it was shortly after Mr. Allen was promoted to the position of production manager from production supervisor. This occurred approximately six or seven months before Mr. Allen's testimony at the January 15, 2008, preliminary hearing, which would make it in either June or July 2007. Mr. Allen described the bread racks as weighing about 4,000 pounds and noted they were on a monorail system and were not easy to roll.

Dr. Do's medical records of May 22, 2008, indicate that claimant was complaining of problems with his right shoulder. An MRI of the right shoulder was performed on

May 29, 2008. In June 2008, Dr. Do began treating claimant's right shoulder, performing a right shoulder arthroscopy on July 21, 2008, after conservative treatment and injections proved unsuccessful. By September 9, 2009, claimant was at maximum medical improvement (MMI) and was released without restrictions.

Dr. Do next examined claimant on July 30, 2009, when claimant was referred to him for an IME for rating purposes. Dr. Do rated claimant at 22 percent to the right upper extremity at the level of the shoulder and 9 percent to the left upper extremity at the level of the arm, with both ratings pursuant to the 4th edition of the *AMA Guides*.² Dr. Do was provided letters from both claimant's and respondent's attorneys regarding the cause of claimant's right shoulder problems. At various times, he found the shoulder both was and was not related to claimant's job with respondent. The opinion varied depending on the history being considered at the time. Ultimately, Dr. Do testified that in his opinion, all the conditions for which he provided claimant treatment were related to claimant's work injuries and accidents with respondent.

Claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist George G. Fluter, M.D., on January 5, 2009. The history provided to Dr. Fluter indicated left upper extremity problems beginning in 2006, followed by right upper extremity problems sometime thereafter. Claimant also described the bread rack incident when claimant suffered additional injury to his right shoulder. Claimant was diagnosed with bilateral upper extremity pain; bilateral carpal tunnel syndrome; ulnar neuropathy at the left elbow; lateral epicondylitis and radial nerve entrapment at the right elbow; and range of motion limitations in the right shoulder. Dr. Fluter determined that claimant had suffered a 31 percent impairment of function to the right upper extremity and a 24 percent impairment of function to the left upper extremity, all pursuant to the 4th edition of the *AMA Guides*.³ However, Dr. Fluter acknowledged that he rated claimant's wrists for the carpal tunnel syndrome and by utilizing the range of motion method of the *Guides*. He also acknowledged that he deviated from his normal practice in claimant's case and gave claimant a full 10 percent impairment to the right wrist and left wrist even though claimant had normal nerve conduction studies on the left side. If he were to take out the range of motion percentages, the impairment would be 26 percent to the right upper extremity and 19 percent to the left upper extremity. At the time of the regular hearing, claimant continued to work for respondent performing his regular job.

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

³ *AMA Guides* (4th ed.).

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁴

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁶

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁷

It is not disputed that claimant suffered injuries to his left upper extremity while working for respondent. The dispute centers around the right upper extremity. While claimant's testimony is confusing regarding the start of the right upper extremity complaints, it is clear that his work activities involve repetitive upper extremity work. Both Dr. Do and Dr. Fluter found the job tasks with respondent at least partially responsible for causing or aggravating claimant's upper extremity problems bilaterally. Additionally, claimant suffered a traumatic incident when the bread rack hit his right shoulder. The Board finds that claimant did suffer an accidental injury and/or injuries to his right upper extremity at the level from the hand to the shoulder while working for respondent.

⁴ K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ K.S.A. 2005 Supp. 44-501(a).

⁷ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.⁸

Mr. Allen was aware that claimant suffered bilateral hand and arm complaints while working for respondent. He was aware of the repetitive nature of claimant's job. Additionally, he was made aware of a traumatic injury to claimant's right shoulder at approximately the time the incident occurred. This injury, which appears to have occurred in June 2007, ultimately led to the surgery performed on claimant's shoulder by Dr. Do. The Board finds that claimant provided timely notice of the injuries to claimant's right upper extremity.

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁹

Dr. Fluter acknowledged that he rated claimant for the diagnosed conditions in his upper extremities, but also added 5 percent to each upper extremity for range of motion limitations. The Board finds that Dr. Fluter's method of calculating the upper extremity impairments was inappropriate under the *AMA Guides*, as it amounts to using duplicative rating criteria in assessing claimant's functional impairment. The Board finds that Dr. Fluter's rating should be reduced by the 5 percent range of motion amounts, leaving impairments of 26 percent to the right upper extremity at the level of the shoulder and 19 percent to the left upper extremity at the level of the arm.

In considering claimant's ultimate functional impairments, the Board finds claimant has suffered a 24 percent functional disability to the right upper extremity at the level of the shoulder and a 14 percent functional disability to the left upper extremity at the level of the arm. In so determining, the Board considered both the final rating of Dr. Do and the final rating of Dr. Fluter.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed with regard to the finding that claimant suffered accidental injury to his right upper extremity which arose out of and in the

⁸ K.S.A. 44-520.

⁹ K.S.A. 44-510e(a).

course of his employment with respondent and the finding that timely notice was provided for the accidents to the right upper extremity, but modified with regard to the percentage of functional impairment suffered to each upper extremity. Claimant is awarded a 24 percent functional disability to the right upper extremity at the level of the shoulder and a 14 percent functional disability to the left upper extremity at the level of the arm. In all other regards, the Award of the ALJ is affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas Klein dated October 12, 2009, should be, and is hereby, modified to award claimant a 24 percent permanent partial disability on a functional basis to the right upper extremity at the level of the shoulder and a 14 percent permanent partial disability on a functional basis to the left upper extremity at the level of the arm, but affirmed in all other regards.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Robbie D. Hubbard, and against the respondent, Earthgrains Baking Companies, Inc., and its insurance carrier, Indemnity Insurance Company of North America, for an accidental injury which occurred on and after April 3, 2006, and based upon an average weekly wage sufficient to qualify claimant for the maximum weekly rate of \$467.00.

Right Upper Extremity

Claimant is entitled to 54 weeks at the rate of \$467.00 per week or \$25,218.00 for a 24 percent permanent partial disability at the level of the right shoulder.

As of the date of this Order, the entire amount of this award is due and owing and ordered paid in one lump sum less any amounts previously paid.

Left Upper Extremity

Claimant is entitled to 2.47 weeks of temporary total disability compensation at the rate of \$467.00 totaling \$1,153.49, followed by 29.05 weeks at the rate of \$467.00 totaling \$13,566.35 for a 14 percent permanent partial disability at the level of the left arm, making a total award of \$14,719.84.

As of the date of this Order, the entire amount of this award is due and owing and ordered paid in one lump sum less any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of March, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
 Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
 Thomas Klein, Administrative Law Judge